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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STEVEN ROTH, Plaintiff and Respondent, v. SEYMOUR BADENER et al., Defendants and Appellants.	B263315 (Los Angeles County Super. Ct. No. SC122493)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gerald Rosenberg, Judge. Reversed and remanded.

Law Offices of George A. Shohet, George A. Shohet; Robert Epstein for Defendants and Appellants.

Holmes, Taylor & Jones, Andrew B. Holmes; Benedon & Serlin, Gerald M. Serlin, Wendy S. Albers for Plaintiff and Respondent.

Appellants, George A. Shohet, a Professional Corporation, George Shohet and Seymour Badener, appeal from an order denying their anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd. (i).)[1] Appellants also challenge an order imposing monetary sanctions against their counsel for making a frivolous motion. (§ 128.7.) We reverse because the complaint is predicated in part on protected activity.

The Complaint

Respondent Steven Roth filed a complaint on May 2, 2014, against appellants, seeking compensation for consultation services he allegedly provided as an insurance/financial advisor to appellants and others. Roth also alleged that Shohet, an attorney, deprived Roth of income Roth would have earned had Shohet not interfered with a mutual client in the prosecution of a lawsuit against third parties.

Roth alleged that he and his company, Wealth Management International, Inc., provide financial advice and analyses of insurance and investment opportunities and provide other services to clients. In 2012, Roth's company launched a *Life Settlement Loss Recovery Program*, which was designed to locate and assist seniors who had been cheated in life insurance settlement transactions. Roth had previously referred a number of clients to Attorney Shohet. Shohet agreed to reimburse 25 percent of expenses incurred in the program in exchange for referrals from Roth.

Badener had been defrauded in a life insurance transaction. Roth located Badener, an elderly individual, through a letter dated November 27, 2012. The letter, which was sent through Roth's program, offered assistance to seniors who might have been defrauded by predatory insurance agents. The letter stated, in part, that Badener might be entitled to compensation if he lost money, became indebted on a loan, or incurred adverse tax consequences in connection with the purchase of a life insurance policy. It also stated that Badener might be entitled to compensation if his insurance policy was sold as a life

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[1] SLAPP is the acronym for strategic lawsuit against public participation. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

settlement because he might have been defrauded from receiving the full value of the policy.

The letter further stated: "If you are a victim to these types of schemes, we may be able to assist you to receive monetary compensation. **To initiate an evaluation of your claim, promptly complete and return the enclosed claim form along with your documentation as listed on the last page of the form.** We will contact you after reviewing your completed claim form and documents. [¶] . . . Your claim will be reviewed confidentially by our team of attorneys and experts. Your information is protected by the attorney-client privilege as provided by law and will be used solely to evaluate your claim. There is no charge for our review. If your claim is approved, you will only pay a fee from the recovery you received. There is no cost to you unless you receive a recovery." (Original bold.)

Badener accepted Roth's offer to assist in seeking to redress Badener's losses from an insurance transaction. During a meeting with Badener, Roth advised him that Badener would compensate Roth's company at the rate of $750 per hour. After Badener entered into an agreement to retain Roth's company, Roth referred Badener to Shohet.

Roth alleged that he analyzed Badener's potential claims and discussed the matter with Badener prior to the referral. After the referral, Roth met with Badener and Shohet to discuss the case. Badener subsequently retained Shohet to represent him in a lawsuit entitled *Seymour Badener v. Anthony J. Turcottee, Jr., et al.*, case No. SC120503. The lawsuit was filed against insurance agents and a broker who were involved in the transaction identified in Roth's program.

Roth sued appellants for breach of contract, promissory fraud, quantum meruit, book account, unjust enrichment, intentional misrepresentation, intentional interference with prospective economic relations, tortious interference with contract and constructive trust.[2] These causes of action are predicated on claims that may be summarized as

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[2] The tortious interference with contract is labeled as the ninth cause of action when it was actually the eighth cause of action

follows: (1) Shohet did not pay Roth properly in the referral program they had established. (2) Regarding Badener, Shohet did not pay Roth for the work performed before Badener engaged Shohet. (3) After Badener engaged Shohet as his attorney, Shohet did not use Roth as an expert witness or consultant in Badener's case.

Thus, in addition to alleging that Roth was not paid for services rendered, the complaint also alleged that appellants' conduct deprived Roth of compensation Roth would have earned on the Badener matter. In the intentional interference with prospective economic relations cause of action, the complaint alleges that Shohet's wrongful conduct disrupted the relationship between Roth and Badener "in that [Roth] was prevented from performing the further consulting work he otherwise would have performed in connection with the [third party action] and from receiving the resulting compensation he would have received, which is calculated to be at least $30,000." The cause of action for tortious interference with contract alleges that Attorney Shohet advised his client that he should breach his contract with Roth. As a result of Shohet's actions, Roth "was prevented from performing the consulting work he otherwise would have performed and from receiving the resulting compensation" Roth would have received but for the breach.

The Anti-SLAPP Motion

Appellants answered the complaint and then moved to strike it under section 425.16. Appellants argued in the anti-SLAPP motion that the allegations supporting the claims against them were made in the context of a contemplated lawsuit, which is a protected activity. They also argued that Roth could not establish a probability of prevailing on the merits because there was no legal duty to hire Roth during the litigation against the insurance company or to compensate Roth for the services rendered. Appellants asserted that the complaint was barred by the litigation privilege embodied in Civil Code section 47, subdivision (b), and that Roth did not have the proper insurance licenses to provide the services for which he sought compensation. The contractual and

quasi-contractual claims against Shohet fail, it was asserted, because the work performed for the client, Badener, was not for Attorney Shohet's benefit.

In support of the motion, Badener declared that Roth and his company solicited Badener's business through a letter in January 2013. Badener, who was 81 at the time of the declaration, had suffered financial losses from a life insurance scheme which required him to pay approximately $41,000 in taxes. Badener completed a claim form and talked to Roth on the telephone about a potential claim against the agents and broker. Badener denied being told that Roth charged $750 per hour. Badener, who thought the services were free, would never have agreed to that amount. In March 2013, Badener, Roth and Shohet had an hour-long telephone discussion regarding potential claims. Badener also retained Shohet in March 2013. Badener subsequently learned that Shohet and Roth were in dispute about a case that was not related to Badener's. Although Roth urged Badener to continue working with him, Badener chose to end the relationship.

Shohet declared that Roth is a "serial litigant." Roth had filed three lawsuits against Shohet and his firm. Shohet accused Roth of abusive litigation tactics, including wide-ranging discovery requests for materials protected by the attorney-client privilege and as work product. Shohet indicated that in the case at bench Roth had served 40 document requests, 73 form interrogatories with subparts, and 83 requests for admission. Much of the discovery was privileged and confidential. Shohet asserted that the discovery requests were stayed under section 425.15, subdivision (g).

Shohet provided details about fees allegedly owed to Roth from an unrelated dispute with Roth with a third party. Shohet confirmed that Roth had met with and received documents from Badener prior to Badener's retention of Shohet to file the action against the insurance agents and broker. Shohet declared that the $750 hourly rate was fabricated and outrageous. Shohet denied that Badener agreed to that amount. Badener and Shohet believed Roth's services were free of charge.

Shohet asserted that Roth would only have been paid if he became an insurance consultant in the action against the insurance agents. Roth's litigation against Shohet

precluded Shohet from retaining Roth. Shohet denied agreeing to compensate Roth for a portion of expenses for reaching out to individuals such as Badener. Shohet also included a number documents questioning Roth's and his company's credentials and licenses to provide financial and insurance services. Shohet also asserted that, in order to provide the services for which Roth sought compensation, Roth needed, but did not have, a *Life and Disability Analyst* license.

The Sanctions Motion

In response to the anti-SLAPP motion, Roth filed a motion for sanctions pursuant to section 128.7, subdivision (b) against Shohet and his attorney, Robert Epstein. Roth asserted that Shohet had filed declarations which falsely asserted that there were never any agreements to reimburse Roth and his company. In support of the section 128.7 motion, Roth provided exhibits showing that, in 2012 and 2013, he and Shohet had communicated in e-mails and had exchanged invoices documenting a payment arrangement about the shared costs of the program. For example, in an e-mail dated March 4, 2013, Shohet wrote that his firm would "look at the time spent on a particular case and compensate [Roth] accordingly." Shohet also wrote: "At this stage, there is a sense of what it takes to work up a case so that it can be evaluated. At least there is a range of time you're spending on the work up phase. What we might do is look at that range and make some approximations based on the anticipated workload. That way you'd have a better sense of what you'd receive out of any recovery or referral fee."

Roth argued that the case was a fee dispute and that the failure to pay for services is not protected conduct. Appellants were using the anti-SLAPP motion to take advantage of the automatic discovery stay and delay the action. Roth also asserted that the litigation privilege did not apply to the fee dispute and the licenses were not required for the services rendered to Badener.

Appellants opposed the sanctions motion by asserting, in part, that section 425.16, subdivision (g) provided an important statutory right to a discovery stay. The right was

important in this case because Roth was "a serial litigant who propounds voluminous discovery" in order to burden his opponents and cause unnecessary delay and expense.

Appellants argued that their anti-SLAPP motion had merit because Roth's claims were made in the context of a contemplated lawsuit. The allegations of wrongful conduct in the complaint all relate to services Roth allegedly performed or did not get a chance to perform regarding Badener's lawsuit against the insurance agents. The conduct is protected under section 425.16, subdivision (e)(2). Appellants reiterated arguments that: they had no duty to hire or compensate Roth in litigating Badener's lawsuit; the conduct was barred by the litigation privilege; Roth was not properly licensed; and the contractual and quasi-contractual claims lacked merit.

On March 19, 2015, the trial court entered an order granting Roth's motion for sanctions under section 128.7. The trial court found that the anti-SLAPP motion under section 425.16 "is unwarranted by existing law" and violated section 128.7, subdivision (b)(2). The trial court concluded that the lawsuit was premised on the nonpayment of a fee and the failure to hire Roth as an expert in a separate case. Roth's lawsuit did not involve a public issue or an issue of public interest under section 425.16. Appellants' attorneys filed the section 425.16 motion for the improper purpose of obtaining a discovery stay. The trial court ordered Shohet and Epstein to pay $3,800 as a sanction and struck the section 425.16 motion. Appellants filed a timely notice of appeal from the order.[3]

DISCUSSION

I. The Anti-SLAPP Motion

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free

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[3] The trial court's order did not state that the anti-SLAPP motion was denied. Instead, the trial court struck the motion as an improper pleading under section 128.7. As such, we may regard the order as a denial of the anti-SLAPP motion, which is both appealable and reviewable. (See *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 680, fn. 2.)

speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e) states: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

In order to protect the constitutional rights of petition and free speech, courts broadly construe section 425.16. (§ 425.16, subd. (a); *Kibler v. Nothern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.) In deciding whether to grant a special motion to strike, the trial court engages in a two-step analysis. The first step considers whether the defendant has satisfied an initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

If defendant establishes the first prong, the second step requires plaintiff to establish a probability that he or she will prevail on the merits. (§425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 (*Flatley*).) Plaintiff's burden is established by making a prima facie showing of facts that would sustain a favorable judgment if the submitted evidence is credited. (*Oasis West Realty , LLC v. Goldman* (2011) 51 Cal.4th

811, 820 (*Oasis*).) The trial court does not weigh the evidence; however, evidence which is favorable to a plaintiff is accepted as true. (*Id.* at pp. 819-820.) The court only considers defendant's evidence to determine if the claim is defeated as a matter of law. (*Ibid.*)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merits—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

Recently, the California Supreme Court dealt with a question present in this case and which has divided or perplexed the Courts of Appeal. That question is: "How does the special motion to strike operate against a so-called 'mixed cause of action' that combines allegations of activity protected by the statute with allegations of unprotected activity?" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381.) The high court determined that an anti-SLAPP motion "may be used to attack parts of a count as pleaded." (*Id.* at p. 393.) Thus, in reversing the Court of Appeal decision in *Baral*, the Supreme Court ruled that a defendant may make an anti-SLAPP attack against a "claim" that is but a part of a formal cause of action, as long as that claim arises from protected activity. (*Id.* at pp. 394-396.)

In explaining its conclusion, the Supreme Court stated that the descriptive phrase "mixed cause of action" was not being used in a fully accurate manner. "To avoid confusion," the Supreme Court held that an anti-SLAPP motion may be brought against allegations arising from protected activity and from which a claim for relief is provided. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 395.)

In evaluating whether the anti-SLAPP statute applies, prior to the Supreme Court decision in *Baral*, California courts considered "[t]he principal thrust or gravamen" of the cause of action upon which the claims are made against a defendant. (*Premier Medical*

Management Systems, Inc. v. California Ins. Guarantee Assn. (2006) 136 Cal.App.4th 464, 472.) When a cause of action arose out of both protected and unprotected conduct, the issue became whether the free speech or petition right is only incidental to the cause of action. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.) "Where a cause of action is based on both protected activity and unprotected activity, it is subject to section 425.16 '"'unless the protected conduct is "merely incidental" to the unprotected conduct.'"' [Citations.]" (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1187.) To determine the gravamen of a claim, courts examined "the specific acts of alleged wrongdoing and not just the form of the claim." (*Drell v. Cohen* (2014) 232 Cal.App.4th 24, 29-30 (*Drell*).) Our Supreme Court has also held that appellate courts review de novo a trial court's ruling on a special motion to strike. (*Oasis, supra*, 51 Cal.4th at p. 820.)

II. **Protected and Nonprotected Activity**

Appellants argue that the complaint arose out of conduct protected by section 425.16, subdivisions (b)(1) and (e). Appellants contend "[t]his case arises out of alleged false promises and misrepresentations in connection with contemplated and actual litigation; classic protected activity under the statute." Roth counters that there is no protected activity because the complaint "alleges that [appellants] engaged in wrongdoing when they failed to pay for services that they had used and promised to use."

We begin by noting that appellants are correct that the issue arose within the context of litigation. However, "not all litigation-related conduct is protected activity." (*Drell, supra*, 232 Cal.App.4th at p. 30.) Roth's complaint is only subject to section 425.16 if the gravamen of the complaint is that appellants engaged in conduct that is a protected activity. The statute does not apply when the asserted protected activity "is not the root of the complaint" but "merely the setting in which the claims arose." (*Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1392.) Section 425.16 does not apply when the petitioning activity is "part of the 'evidentiary landscape' within which the action arose" but is not the gravamen of the complaint. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 494.) For that reason, appellants are incorrect that

the mere fact that Shohet eventually filed a lawsuit on Badener's behalf makes the complaint against Shohet and Badener a protected activity.

Roth is correct in that the complaint alleges, in part, that Roth and his company provided insurance-related services to Badener. Roth then referred Badener to Shohet to provide legal services against insurance agents and a broker based on Roth's analysis of Badener's losses from an insurance transaction. Roth and Shohet had a separate agreement governing Roth's compensation for referrals of this nature. Thus, part of the claim is that Roth and Shohet had a fee dispute because Shohet did not pay for Roth's services in unrelated matters as well as the Badener matter. The failure to pay for Roth's services was not a protected activity. (See *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th, 182, 186, 190 [§ 425.16 did not apply to an action to recover court reporter fees in that the nonpayment of overdue invoices is not a protected activity].) "None of the purposes of [section 426.16] would be served by elevating a fee dispute to the constitutional arena." (*Drell*, *supra*, 232 Cal.App.4th at p. 30.)

However, this case does not present a simple fee dispute for services which had already been performed between Roth and Shohet. Instead, the complaint also alleges that, after Shohet and Roth were engaged in a fee dispute in an unrelated matter, the dispute poured over into the Badener matter. Roth was retained by Badener to evaluate an insurance transaction for possible financial injuries in which case Roth would provide a legal referral. Roth would be compensated for the evaluation *and provide further assistance to the counsel*. In the event of a recovery from third parties, Roth would be compensated for both the past services and future consultation services.

Appellants' complaint alleges that Roth also should have been hired as a litigation consultant in the Badener lawsuit. According to appellants, under those circumstances, the result is controlled by the decisions in *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (*Tuszynska*), *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510 (*Hunter*), and *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 (*Taheri*).

In *Tuszynska, supra,* 199 Cal.App.4th 257, an attorney sued various parties for discrimination on the ground that because she was a woman she allegedly received fewer referrals under a prepaid legal services plan for a county sheriff's association. (*Id*. at p. 261.) The complaint also alleged the attorney was blamed for losing a criminal case against one of the association's deputies. The association defendants then refused to pay the attorney for sentencing proceedings and the new trial motion. (*Id*. at pp. 263-264.) They also allegedly slandered the attorney for settling a different case. (*Id*. at p. 264.) *Tuszynska* concluded that the decisions to select an attorney and to discontinue funding are protected activities under section 425.16, subdivision (e)(2). (199 Cal.App.4th at pp. 268-271.)

In *Hunter, supra,* 221 Cal.App.4th 1510, a male sued a television broadcasting company alleging that the company refused to hire him as a weather anchor because of his gender and age. (*Id*. at p. 1513.) *Hunter* concluded that the company's selection of weather anchors is act in furtherance of free speech rights. (*Id*. at pp. 1521-1526.) *Hunter* further concluded that, because weather reporting is a matter of public interest, the hiring of a weather anchor was necessarily in connection with a public issue. (*Id*. at pp. 1526-1527.)

The cases of *Tuszynska* and *Hunter* both concerned whether a hiring decision—as an attorney in *Tuszynska* and as a TV weather reporter in *Hunter*—was a protected activity (regardless of whether an illegal discrimination drove the decision or not). Here, the initial hiring decision related to work that had already been performed. The complaint alleged that Roth evaluated an insurance transaction for an agreed compensation and then appellants refused to abide by the compensation agreement. Thus, that particular claim in the complaint did not arise from appellants' right to hire Roth. It arose from the failure to compensate Roth after he had already been hired.

Nevertheless, this case is similar to *Tuszynska* in at least one aspect, concerning the allegations that Roth should have been allowed to continue to work in the litigation against the third parties. Each of the claims in the complaint incorporates allegations that

Badener's decision to follow his attorney's advice about not hiring Roth in the lawsuit against third parties is actionable. At least two of the claims against Shohet are based on advice to his client to discontinue his relationship with Roth in the context of a lawsuit. The conduct is protected by section 425.16, subdivision (e).

In that respect, appellants are also correct that this case is similar to *Taheri*, in which an issue arose about liability for communications between an attorney and his client. In *Taheri*, *supra*, 160 CalApp.4th 482, a law firm sued an attorney for allegedly soliciting the firm's client. (*Id*. at pp. 485-486.) The firm sued the attorney for intentional interference with prospective economic advantage and intentional interference with business relations. (*Ibid*.) *Taheri* concluded that the causes of action arose from protected activity because the firm's causes of action arose directly from communications between the client and the attorney about pending lawsuits against the client. (*Id*. at pp. 489-490.) In this case, at least two of the claims are predicated upon the theory that communications between an attorney and the client led to Roth's injury. The communications are, therefore, protected. (*Ibid*.)

As we stated earlier in this opinion, Roth's claims can be categorized as follows: (1) Shohet did not pay Roth properly in the referral program they had established. (2) Regarding Badener, Shohet did not pay Roth for the work performed before Badener engaged Shohet. (3) After Badener engaged Shohet as his attorney, Shohet did not use Roth as an expert witness or consultant in Badener's case.

The claims in categories (1) and (2) relate to conduct occurring prior to Badener's agreeing to engage Shohet as his attorney and commencing litigation against the insurance entities. If Roth performed work for the benefit of Badener and Shohet, he is entitled to compensation. The conduct involves no protected activity.

The claims in category (3) relate to conduct occurring after Badener engaged Shohet and clearly involves the protected activity of attorney-client consultation and advice, as well as litigation both as to the insurance entities and between Roth and Shohet, precluding the continuation of any relationship that may have been agreed upon.

Under the circumstances, the trial court properly denied in effect appellant's anti-SLAPP motion as to claims in categories (1) and (2). But the trial court could have granted the motion as to the claims in category (3) insofar as those claims arose from protected activity. Most of the causes of action, if not all the causes of action, incorporate allegations of conduct that is protected activity, i.e., damages from the refusal to use Roth in litigation against third parties. Accordingly, the matter should be remanded for the trial court to consider the anti-SLAPP motion on the merits and for a determination of whether Roth can establish a probability of prevailing on the merits of those claims.

III. The Sanctions Motion

We have concluded that the anti-SLAPP motion has merit with respect to at least some of the causes of action. Therefore, the sanctions award under section 128.7 is unwarranted and must be reversed.

DISPOSITION

The judgment is reversed. The matter is remanded for the trial court to rehear the anti-SLAPP motion in accordance with this opinion. Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.